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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/539,445

06/20/2005

Yoshinori Komatsu

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SUGHRUE-265550  
2100 PENNSYLVANIA AVE. NW  
WASHINGTON, DC 20037-3213

EXAMINER

O HERN, BRENT T

ART UNIT

PAPER NUMBER

1783

NOTIFICATION DATE

DELIVERY MODE

01/05/2011

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

SUGHRUE265550@SUGHRUE.COM  
USPTO@SUGHRUE.COM  
PPROCESSING@SUGHRUE.COM

<b>Office Action Summary</b>	<b>Application No.</b> 10/539,445	<b>Applicant(s)</b> KOMATSU ET AL.	
	<b>Examiner</b> BRENT T. O'HERN	<b>Art Unit</b> 1783	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 30 November 2010.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1 and 8 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1 and 8 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                       | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Claims***

1. Claims 1 and 8 are pending.

### **WITHDRAWN REJECTIONS**

2. All rejections of record in the Office action mailed 6/30/2010 have been withdrawn due to Applicant's amendments in the Paper filed 11/30/2010.

### **NEW REJECTIONS**

3. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

### ***Claim Rejections - 35 USC § 103***

4. Claims 1 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gupta (US 2003/0019888) in view of Matsuda et al. (US 5,773,073) and Hotta et al. (US 2002/0182303).

Gupta ('888) teaches a container with a discharge nozzle and propellant (*See paras. 97, 49-53.*) including a foamable water-in-oil type emulsion product such as mousses, foams, edible spreads, butter/margarine and oil sprays wherein the mousse is generated at the time of jetting (*See paras. 97, 49-53 and FIG-1, container #100 with food product. The claims are interpreted as being directed to an emulsion that is capable of being discharged as a mousse and not a mousse emulsion.*), which is contained in an aerosol container with a gas propellant (*See paras. 97-98, 49-53, Abstract and FIG-1, aerosol container #100.*), however, fails to expressly disclose wherein the emulsion comprises an emulsifier in the amount of 0.5 to 6.0 wt% based on

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the emulsion; wherein the oil in the water-in-oil type emulsion is an edible oil which has a cloud point (ASTM) of about 4.4 °C (40 °F) or lower, the container comprises a gas propellant partially dissolved in said water-in-oil emulsion, wherein the emulsifier is at least one member selected from the group consisting of monoglycerin fatty acid ester, sucrose fatty acid ester, sorbitan fatty acid ester, and polysorbate and wherein the monoglycerin fatty acid ester, if included, is in the range 2.5-3.0 parts by weight based on the emulsion.

Regarding the propellant, Gupta ('888) teaches that the products placed in the container can contain materials such as mousses and foams (*See paras. 42 and 97.*). Mousses are known in the art to be food products that incorporate air bubbles and foams are substances formed by trapping gaseous bubbles in a liquid or solid. Thus, in order for Gupta's ('888) mousses and foams to be mousses and foams there must be gaseous propellants in the food in the container, otherwise the materials that discharge the nozzle would just be liquids or solids. The food must be in the presence of a propellant/gas, otherwise the materials that discharge from the container would be liquids or solids which does not make sense. If Gupta's ('888) food is not interpreted as including a propellant/gas then it would have been obvious to provide a propellant in the food so that Gupta's ('888) food can function as a mousse or foam. The claims do not state how much propellant is present in the container or the pressure of the container. Gases are known to be compressible and when the pressure upon them is reduced the gases will expand and if they are in the presence of a foamable material bubbles/foam can be created when they expand.

Matsuda ('073) teaches glycerin fatty acid ester, sucrose fatty acid ester, and sorbitan fatty acid ester as being emulsifiers for water in oil emulsions being from 0.1 to 5% (*See col. 3, ll. 56-67 and Abstract.*) for the purpose of providing a water in oil emulsion having excellent emulsion stability (*See Abstract and col. 3, ll. 56-67.*). Regarding the claimed oil, Matsuda ('073) teaches wherein the oils in the emulsion are the same corn, soybean oil and salad oils as disclosed by Applicant (*See col. 3, ll. 31-51. Soybean oil has a cloud point of about 14 °F as Applicant admits at page 6 of Applicant's Paper filed 5/21/2009 where Applicant refers to Table 5.3 of the Bailey's publication.*), thus, it would have been obvious that these oils also have the same cloud point as claimed.

Hotta ('303) teaches where sucrose fatty acid ester and sorbitan fatty acid ester emulsifiers are used individually in the formation of spreads for the purpose of providing a product with improved refrigeration resistance (*See paras. 5, 36 and Abstract.*).

Therefore, it would have been obvious to a person having ordinary skill in the art with Gupta ('888), Matsuda ('073) and Hotta ('303) before them to provide the emulsion as claimed in Gupta's ('888) container in order to provide a water in oil emulsion that can be discharged as a mousse with excellent emulsion stability.

#### **ANSWERS TO APPLICANT'S ARGUMENTS**

5. The declaration under 37 CFR 1.132 filed by TAMAI on 11/30/2010 is sufficient to overcome the 35 USC 112 rejections of claims 1 and 8. The declaration is not effective in overcoming the 35 USC 103 rejections as the Examiner does not disagree that Gupta teaches a chamber container with food being placed in the top portion and a

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propellant placed in the bottom section. As discussed above, Gupta teaches the food being mousse and foam (*See paras. 42 and 97.*) which are required to be formed by gas/propellant, otherwise, they would not be mousse or foam.

6. In response to Applicant's arguments (*See pp. 3-6 of Applicant's Paper filed 11/30/2010.*) regarding the 35 USC 112 rejections, it is noted that the amendments and arguments are effective in overcoming said rejections.

7. In response to Applicant's arguments (*See p. 6, para. 5 of Applicant's Paper filed 11/30/2010.*) that Gupta's gas pushes the content of the container out of the container, it is noted that the Examiner concurs. As discussed above, the Examiner takes the position that there must also be a separate gas in the mousse/foam in the container.

8. In response to Applicant's arguments (*See p. 6, para. 5 of Applicant's Paper filed 11/30/2010.*) that in order for Gupta's mousse to be jetted in the form of a mousse it must already be a mousse which is distinguished from the claim, it is noted that said arguments are not persuasive. Applicant's claims are not directed to a method of discharging food from a container but rather to a food in combination with a container. As discussed above, Gupta teaches the food being in a mousse or a foam form. Even if Gupta's material is in the form a mousse this does not matter as the claims just require the food to be capable of forming a mousse when discharged from the container which clearly is the case with Gupta. There is not anything in Gupta that states that the food is a mousse or foam inside the container but rather a liquid or solid when discharged from the container. If the material is not a mousse upon discharge then there would not be any reason to place a mousse or foam in the container that is subsequently destroyed.

Thus, in order for the materials to be a mousse or a foam the food must be in the presence of a propellant/gas, otherwise the materials that discharge from the container would be liquids or solids which does not make sense.

9. Applicant's IDS filed 11/30/2010 has been considered.

10. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to BRENT T. O'HERN whose telephone number is (571)272-6385. The examiner can normally be reached on Monday-Thursday, 9:00-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David Sample can be reached on (571) 272-1376. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/BRENT T O'HERN/  
Examiner, Art Unit 1783  
December 27, 2010